IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11041 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CORE HEALTHCARE LTD & 1 - Petitioner(s)
Versus
UNION OF INDIA THROUGH SECRETARY & 3 - Respondent(s)

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Appearance :
MR RAKESH GUPTA FOR M/S TRIVEDI & GUPTA for Petitioner(s) : 1 - 2.
MR ASIM J PANDYA for Respondent(s) : 1 - 3.
NOTICE SERVED for Respondent(s) : 4,
SERVED BY RPAD - (N) for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 29/09/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 This petition primarily raises challenge to show cause notice No.DGAE/MZU/205/12(4) dated 23/03/2000 issued by respondent No.4. The following prayers are made :

> *"(a) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction quashing and setting aside impugned Show Cause Notice No.DGAE/MZU/205/12(4) dated 24.3.2000;*
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> *(b) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction quashing and setting aside impugned*

order No.V.Adj.(SCN)(AEM)15-28/2000 dated 29.9.2000;

(bb) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, direction or order declaring the proceedings initiated under Rules 57-I and 57-U in the impugned Show Cause Notice as lapsed in view of substitution thereof by Notification No.11/2000 CE(NT) dated 1/3/2000;

(c)Pending hearing and final disposal of this petition, Your Lordships will be pleased to restrain the respondent No.2 from proceeding ahead with adjudication of impugned Show Cause Notice No.DGAE/MZU/205/12(4) dated 24/3/2000;

(d)An ex-parte ad interim relief in terms of Paragraph 8(c) above may kindly be granted;

(e)Any other further relief/s as may deem fit in the facts of the case may be

granted".

2 Mr.Rakesh Gupta, learned Advocate appearing on behalf of the petitioner, at the outset submitted that prayer 8(bb) does not survive and is not pursued in light of Section 132 of the Finance Act,2001. Therefore, the only dispute that survives is legality and validity of the impugned notice dated 24/3/2000.

3 Mr.Gupta invited attention to paragraph Nos. 5 and 6 of the impugned show cause notice, Mr.Gupta submitted that all the four aspects raised in the impugned show cause notice had come up for consideration earlier in point of time and after adjudication/appeal proceedings the issues have been decided in favour of the petitioner. The impugned show cause notice is relatable to the same period i.e. April,1995 to May,1998 and hence is bad in law in absence of any change in facts or circumstances. In this connection he invited attention to :

[i] Four show cause notices issued on 3/6/1997,

[ii] Order-In-Original made by Assistant Commissioner of Central Excise, Division II, Mehsana,

[iii] Order of Commissioner (Appeals) dated 15/10/1998;

[iv] Order of Assistant Commissioner dated 30/11/1998;

[v] Show Cause Notice dated 3.12.1997/31.12.1997;

[vi] Order of Commissioner dated 31/3/1999;

[vii]Five show cause notices and order of demand by Assistant Commissioner dated 26/11/1997;

[viii]Order of Commissioner(Appeals) dated 24/6/1999.

According to him the issue as to classification of the petitioners' products, the issue as to entitlement of petitioner to encash accumulated modvat credit and/or utilization of modvat credit, obtaining of rebate has been dealt with in the aforesaid proceedings and all orders of the Adjudicating Authority or the Appellate Authority wherein the petitioner had succeeded were being reagitated by way of impugned show cause notices. That in fact department had preferred appeals before the Tribunal and the said appeals are pending.

Therefore also, it was submitted that the department could not issue show cause notice for the said period once again.

4 Mr.Malkan appearing on behalf of the respondent authority invited attention to the affidavit-in-reply filed by the respondent authority and submitted that the matter was brought before the Court at the stage of show cause notice and hence the Court should not intervene and permit the revenue to proceed with adjudication proceedings. It was further submitted that the impugned show cause notice had been issued on the basis of evidence relied upon by respondent No.4 which had never been taken into consideration in the earlier round of proceedings.

5 As can be seen from impugned show cause notice the petitioner has been called upon to explain the following aspects :

> *"5. Whereas, investigations revealed, as mentioned in statement of Facts that (upto May,1998) M/s.CHL have fraudulently*

manipulated and deliberately mis-declared the Export products i.e I.V.Fluids having Generic Pharmaceutical Names appearing in various Pharmacopoeias as 'P or P Medicines', by inserting word 'Core IV after the Generic name and they classified the products under Chapter Sub-heading No.3003.10 of the Central Excise Tariff Act,1985, to facilitate encashment of the accumulated Modvat Credit by way of Export of the said product under claim of rebate. It is also noticed that, they had wrongly availed and utilised Modvat Credit Under Rule 57A and 57Q on the said products, whereas these products were correctly classifiable udner Chapter Sub-heading No.3003.20 of the Central Excise Tariff Act,1985, and which attracted "NIL" rate of duty in the relevant period.

6 Whereas, on the basis of investigation conducted, as mentioned in the Statement of Facts, it was noticed that M/s.CHL have

Fraudulently obtained the rebate claim totally amounting to Rs.2,76,416/- for the year 1995-96 to 1998-99 (upto May,1998) as detailed in Annexure -"B-1" to this Show Cause Notice. They have also availed/utilised wrong Modvat Credit (short reversed on goods cleared to domestic market) totally amounting to Rs.95,74,196/- under Rule 57A for the period April, 95 to August,96 as detailed in Annexure "B-2 to this Show Cause Notice and Rs.1,02,16,695/- under Rule 57Q for the period 1995-96 to 1998-99 (Upto May,1998) as detailed in Annexure "C-1" to the Show Cause Notice".

7 It is apparent that all issues were raised and decided. Therefore, the first issue that requires consideration is whether the petitioner fraudulently and deliberately misdeclared the export products i.e "IV Fluids" having Generic Pharmaceutical Names appearing in various Pharmacopieias as patent or proprietary medicines. In this connection, show cause notice dated 3/6/1997 (Annexure-B) makes it clear that identical issue was raised and the petitioner

was called upon to show cause as to why modvat credit should not be recovered on the basis of incorrect classification. The petitioner having replied, Order-in-Original came to be made by Assistant Commissioner confirming the show cause notice by order dated 29/01/1998.

8 The petitioner challenged the same by way of appeal before the Commissioner (Appeals). In paragraph No.7 of the appellate order dated 15/10/1998, it was held by Commissioner (Appeals) that the appellant was using brand name and was liable to be classified under Tariff Entry No.CSH-3003.10 of the Schedule to the Central Excise Tariff Act,1985. The said finding was recorded after observing as under :

> *"7.1. I find substantial force in the arguments raised by the appellants that the names like "CORE IV", "CORE Caps" and "CORE Tabs" are the brand names on which they are exporting their goods. It has been held by the Hon'ble Apex Court*

in the case of Astra Pharmaceuticals (supra) that brand name is one by which the product is identified and asked for. In view of the brand names used on the products by the appellants, the products become PP medicines by virtue of second part of explanation given in Note 2(ii) to Chapter 30 and the product becomes chargeable to duty. However, since the appellants are using the brand names on their product when the same is exported under bond, they are not required to pay duty. Therefore,the provisions of rule 57C cannot be made applicable in this case and the appellants are not required to reverse the modvat credit availed by them on the inputs used in the manufacture of exported goods. The finding of the adjudicating authority, that since the appellants are marketing their products by Pharmacopeial names, it is not

necessary to prove that the words like "Core IV" etc used by them on their products are their brand names, is not correct, in as much as, the appellants are marketing their products in pharmacopieal names only in domestic market and not in foreign market. Therefore, it is concluded that the disputed words used by the appellants viz., "Core IV", "Core Caps" "Core Tabs" etc., are their brand names which establishes relationship between the mark and the medicine, and thereby the appellants products are to be classified under CSH 3003.10 of the schedule to the CETA'85".

9 In relation to issue No.2 an order came to be made by Assistant Commissioner granting rebate after verification of the record as well as recording that the necessary requirements stood fulfilled. As can be seen from the order dated

30.11.1998 not only rebate claim was sanctioned in light of provisions of rule 12(1)(b) of the Central Excise Rules,1944 read with Section 11B of the Central Excise Act,1944, even payment was made by a crossed cheque of same date 30/11/1998 under cheque number mentioned in the order.

10 Similarly in relation to the third issue viz. reversal of modvat credit for same period of identical amounts, a show cause notice came to be adjudicated by Commissioner of Central Excise vide order dated 31/03/1999 recording that the extended period of limitation was not available.

11 It is not necessary to multiply the reference to different show cause notices and the orders made by the authorities from time to time, suffice it to state that all the issues raised in the impugned show cause notices have come up for consideration before the Adjudicating Authority or the Appellate Authority and concluded in favour of the petitioner partially. The basic issue as to classification has

been categorically decided in favour of the petitioner.

12 Though the petitioner has raised the issue regarding its request to cross examine certain officers of the department not being granted, in light of the facts and circumstances of the case, it is not necessary to deal with the same at this juncture. The Affidavit-in-Reply filed by the respondent authority makes various averments to the effect that the impugned show cause notice issued by respondent No.4 is based upon documentary evidence such as copies of contracts entered into between the petitioner and purchasers of exported goods does not otherwise point out as to what was the additional evidence which has come on record subsequently. No such evidence is annexed with the affidavit-in-reply. As against that when by way of illustration show cause notice dated 3/6/1997 and the Order-in-Original which follows are taken into consideration it is apparent that the Adjudicating Authority had initiated the proceedings on the same

set of facts and circumstances and based on the same line of reasoning. In the adjudication order dated 29/1/1998 the Assistant Commissioner has categorically recorded that the petitioner received the export orders in generic name and not under the name of 'Core IV', 'Core Tabs' or 'Core Caps' which are considered by the petitioner as product names or brand names. The same charge appears in the impugned notice. Therefore, the averment in the affidavit-in-reply that there is additional material available with the respondent authority on the basis of which it is entitled to issue the impugned notice is not borne out from the facts and evidence on record.

13 In the circumstances, the respondent authority, especially respondent No.4, has failed to place any material on record to show, even prima facie, that it is entitled to assume jurisdiction for the purpose of issuance of impugned show cause notice for the same period and relating to the same issue which has already been adjudicated upon in past. Once the respondent authority fails to establish

jurisdictional facts for assumption of jurisdiction as a natural corollary the impugned show cause notice cannot be allowed to stand and the same is accordingly quashed and set aside.

14 The petition stands allowed in the aforesaid terms. Rule made absolute. The respondent shall bear the cost of the petition quantified at Rs.5,000/-.

(D.A.Mehta,J) (H.N.Devani,J)

m.m.bhatt